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No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a Partnership,
Petitioner,

v.

DONALD T. REGAN, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ELECTRONIC DATA SYSTEMS CORPORATION IRAN IN SUPPORT OF DAMES & MOORE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Electronic Data Systems Corporation Iran ("EDS") respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae* in support of Petitioner Dames & Moore.* EDS has a unique and substantial interest in presenting its position, which is different from that of any litigant in the Iranian cases, on the sweeping questions of critical national importance pending before this Court. EDS respectfully submits that only through the facts presented in its fully devel-

---

* Both the Petitioner, Dames & Moore, and all Respondents, the Secretary of the Treasury and the United States of America, have consented in writing to the filing of an *amicus* brief by EDS. Intervenor Bank Markazi also has consented. Letters documenting consent by these parties are being lodged with the Court. The two remaining Intervenors have refused consent.

oped litigation may the full scope of the critical constitutional ramifications of the questions presented for determination before this Court be fairly decided.

After two and one-third years of litigation against the Government of Iran in two District Courts and two Courts of Appeals,* the Final Judgment and Order of Attachment secured by EDS have been purportedly "nullified" by an unprecedented Executive fiat that is now before this Court on an extraordinary expedited basis. Unlike the other parties and *amici* in this case, EDS's case is, as conceded by the United States, "unique":

> 1. Only EDS, whose action was commenced prior to the Executive's "freeze" order of November 14, 1979, has an effective and enforceable final judgment against the Government of Iran; secured prior to the Algerian Declarations of January 19, 1981; and after an extensive trial on the merits in which Iran participated fully.
>
> 2. Only EDS secured an Order of Attachment, after a full hearing in which Iran actively participated, prior to the freeze; the attached funds, now, totaling some $20 million, were placed in the custody of the court and promptly deposited in a United States Marshal's account.

Furthermore, only EDS has a final judgment and permanent injunction against the United States from interfering with its Final Judgment and Order of Attachment, secured after contested cross-motions for summary judgment, and, thus, EDS is the sole litigant presenting itself to this Court with a final adjudication of its rights against the Executive.

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* Electronic Data Sys. Iran v. Social Security Organization of Iran, No. CA3-79-218-F (filed February 23, 1979, N.D. Tex.), and Nos. 79-2641, 80-1641 & 81-1147 (5th Cir.), *appeals pending*; Electronic Data Sys. Iran v. Social Security Organization of Iran, 71 Civ. 1711 (CLB) (filed April 2, 1979, S.D.N.Y.), *remanded*, 610 F.2d 94 (2d Cir. 1979).

The *EDS* case singularly illustrates the broad consequences of the unprecedented claims of Executive power asserted in this case on the separation of powers among the three branches of Government, unconstitutionally voiding the jurisdiction of federal courts. In short, neither Petitioner nor any other claimant faces the possibility confronting EDS of forfeiting a valid and enforceable judgment, obtained after a full trial on the merits and secured by attached funds placed in the custody of the Court before the Executive freeze order. It is submitted that no other party before this Court has an adequate stake to advance the views set forth in the accompanying brief.

Accordingly, it is respectfully requested that EDS be granted leave to file the following brief as *amicus curiae.*

Dated: June 19, 1981

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF ELECTRONIC DATA SYSTEMS CORPORATION IRAN IN SUPPORT OF DAMES & MOORE

INTRODUCTION

Electronic Data Systems Corporation Iran ("EDS")[1] has pending in the lower courts a case comprehended by the issues that have been placed before this Court. The United States seeks on those issues a ruling "that will control in *all* district courts, . . . and remove any remaining uncertainty about the validity" of the Executive's actions (Mem. Resps. at 9). This brief addresses the ramifications of a broad ruling with respect to the

[1] EDS is a subsidiary of E.D.S. World Corporation, a subsidiary in turn of Electronic Data Systems Corporation.

claim of executive power implicit in this request. Those ramifications are illustrated by EDS's situation, which the United States has termed "unique",[2] and which differs from those of Dames & Moore and all other claimants in two respects:

> 1. EDS has an effective and enforceable judgment against Iran—secured prior to the Algerian Declarations of January 19, 1981; the judgment was based on an adjudication of the validity of its commercial claim after an extensive trial in which Iran participated fully.
>
> 2. EDS obtained its attachment of Iranian funds on June 13, 1979—five months before the President's order freezing Iranian assets on November 14, 1979; not only were the funds attached at that time, but they were also reduced to the custody of the court and placed in a marshal's account.

The district court in EDS's case found unconstitutional the assertions of Executive power extending to this judgment and attachment.[3]

SUMMARY OF ARGUMENT

EDS supports the Dames & Moore position and will not argue it here; this brief deals only with the patent unconstitutionality, and particularly dangerous consequences, of (1) permitting the President to extinguish an effective and enforceable judgment based on a full adjudication of the merits, and (2) permitting the President to destroy *pre-freeze* attachments of funds in court custody.

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[2] *See* Memorandum for the Federal Respondents in Opposition, Electronic Data Sys. Corp. Iran v. Social Security Organization of Iran, No. 80-2035, at 8 n.8, *cert. denied*, 49 U.S.L.W. 3912, (June 8, 1981).

[3] Electronic Data Sys. Corp. Iran v. Social Security Organization of Iran, No. CA3-79-218-F (N.D. Tex. June 7, 1981).

I

The Executive, acting alone, proposes to undo the final judgment and findings of an article III court, forcing a successful litigant to plead its case and prove its facts again in a new and alien forum. This assertion of power is unprecedented. If its arguments prevail, the Executive would gain supervisory authority over the rulings of a co-equal branch of the government; it could render advisory—or meaningless—federal judgments under the Foreign Sovereign Immunities Act.

The central function of the judiciary is to find facts and render judgments based on those facts. An effective and enforceable judgment has been rendered in EDS's case. Even while on appeal, it is safe from interference, *McCollough v. Virginia*, 172 U.S. 102 (1898), as is the fact-finding process itself. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

II

The funds attached by EDS were attached and held in the custody of the court well before the freeze began. They are not subject to interference. *Ex Parte Tyler*, 149 U.S. 164 (1893). Other courts ruling on the Executive's authority over Iran claimants' attachments have sought narrow grounds to avoid the destruction of pre-freeze attachments. The Executive should not be granted authority to nullify pre-freeze attachments directly—by transferring them abroad—or indirectly—by forbidding the exercise of the rights conferred by an attachment.

ARGUMENT

I. THE EXECUTIVE'S POWERS CANNOT ENCOMPASS A "SUSPENSION" OF EFFECTIVE AND ENFORCEABLE JUDGMENTS SECURED AFTER A FULL ADJUDICATION OF THE MERITS

EDS brought its breach of contract suit against Iran in February 1979 and obtained its attachment in June 1979—long before the hostage crisis began in November of that year.[4] Iran participated fully in the trial, availing itself of extensive discovery against EDS, deposing numerous EDS witnesses, and securing thousands of EDS documents. Trial, originally scheduled for August 1979, was postponed on several occasions at Iran's request to permit further trial preparation. At the trial itself, which lasted two weeks during January 1980, Iran's counsel presented in full his case, including the testimony of witnesses brought from Iran. Upon consideration of the evidence and post-trial briefs by all parties, the district court entered findings of fact and conclusions of law; based on those adjudications, it entered a final judgment on May 9, 1980. The judgment is effective and enforceable, the district court and court of appeals both having denied requests for stays on appeal.

The President's Executive Order of February 24, 1981 is said to "suspend" [5] this judgment. The plain purpose

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[4] These facts and those set forth below appear in the record in Electronic Data Sys. Corp. Iran v. Social Security Organization of Iran, No. CA3-79-218-F (N.D. Tex.) and Nos. 81-1147, 80-1641 & 79-2641 (5th Cir.), *appeal pending*.

[5] Judge Duffy's opinion pierces the terminology:

> While it may be that "suspending" the claims without limit is more acceptable in a public relations sense than "terminating" or "nullifying" the claims, the result in either case is to prevent claimants from asserting their rights in federal court.

Marschalk Co. v. Iran Nat'l Airlines Corp., 79 Civ. 7035 (CBM) (S.D.N.Y. June 11, 1981).

of the order is to undo the judgment—and the full adjudication of validity of the underlying claim—and force the judgment holder to relitigate his original claim anew. Once he does so, he waives the jurisdiction of the U.S. court in which his judgment lies "suspended." Claims Declaration, Art. VII, para. 2 (Pet. App. 34).

1. By applying the order to the EDS judgment, the Executive demonstrates the breathtaking scope of a power it claims, but does not have. By asserting the power to create, without Congressional authorization,[6] a "new rule of law" for claims against foreign states and foreign nationals, the Executive is claiming authority to remove such cases from article III courts at any stage in the litigation—even after the litigation is over. Algerian Declaration, para. A (Pet. App. 22). The United States has not asked that a new rule of law be applied to the facts found by the district court in ruling on EDS's claim; it is demanding that new facts be found, new rights adjudicated and a new judgment entered by a new tribunal.

This demand raises issues that must be analyzed in terms of separation of powers and resolved "in a manner

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[6] The United States argues that its position is supported by the International Emergency Economic Powers Act, 50 U.S.C. § 1702(a). Most of the lower courts, however, have found that the IEEPA does not augment any Executive authority to suspend claims. This is because the IEEPA confers authority only "with respect to property", and the authority conferred was intended to be limited to the realm of "economic" rather than judicial transactions. American Int'l Group, Inc. v. Islamic Repub. of Iran, Nos. 80-1779 & 80-1891 (D.C. Cir. May 22, 1981), slip op. at 27 n.15; Chas. T. Main Int'l, Inc. v. United States, No. 81-1176 (1st Cir. May 22, 1981), slip op. at 13-14 n.13; *Marschalk Co., supra*, slip op. at 17-30; *Electronic Data Sys. Corp. Iran, supra*, (N.D. Tex. June 7, 1981), slip op. at 20-21.

that preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. 683, 707 (1974). If jurisdiction conferred on the judiciary by the legislative branch is to be accorded its constitutional status, the exercise of that jurisdiction cannot be preempted by the Executive.

2. No action is more basic to the judicial function than the rendering of a judgment. Every other judicial act supports it in some way—by making its issuance possible in the first place, by assessing its correctness, by giving it effect. The ability "of a court to decide and pronounce a judgment and carry it into effect" is the essence of what courts do.[7]

The United States relies on prior claims settlements by executive agreement; yet until this year *no President acting alone had purported to "suspend," "nullify," or otherwise alter or undo a judgment of the co-equal judicial branch.*[8] There is no precedent for the action here. In other contexts, however, the Court has protected the authority of federal judgments. In *United States* v. *Peters*, 9 U.S. (5 Cranch) 115 (1809), for example, the Court held unconstitutional a State's nullification of a

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[7] Justice Samuel Miller, On The Constitution 314 (1891).

[8] The Government's primary authority, The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), involved a treaty; it was not the result of one branch acting alone. *Marschalk Co., supra*, slip op. at 51. Yet, even if the Algerian Declarations had been approved by Congress, The Schooner Peggy would still not be dispositive. The Court in 1801 did not have before it any constitutional challenge. 5 U.S. at 110. The only rights at stake in that case were those of the United States and the crew of a United States "public armed vessel." *Id.* at 105. And the Court made clear that, if unconstitutional, a treaty's "obligation [must be] denied." *Id.* at 110.

federal court judgment, Chief Justice Marshall declaring that

> [i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

9 U.S. at 136. Particularly apt is the Court's admonishment in *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1875), denying the United States' right to assert, and impose, a set-off against a claim that had already been adjudicated:

> [I] is clear that when such a claim as that preferred by the claimants in the original petition passes into judgment in a court of competent jurisdiction it ceases to be open, under any existing act of Congress, to revision by any one of the executive departments or of all such departments combined.

Id. at 648.

Even when an appeal is pending, the judgment of the trial court confers rights that may not be withdrawn. In *McCullough v. Virginia*, 122 U.S. 102 (1898), after a state court judgment was entered but before the appeal was resolved, the Virginia legislature enacted legislation withdrawing authorization for the suit. The Supreme Court refused to give effect to the intervening legislation:

> The writ of error to the Court of Appeals of the State brought the validity of that judgment into review, and the question presented to that court was whether at the time it was rendered it was rightful or not. If rightful, the plaintiff therein had a vested right which no state legislature could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may

> abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

Id. at 123-24

It is the judicial branch, not the executive, that can overturn a judgment, even one on appeal, and require the claimant to start over:

> [I]n the federal courts the general rule has long been recognized that while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality.

Huron Holding Corp v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941). EDS's judgment is of even greater force because there is no supersedeas bond or other stay against it; it is today effective and enforceable.[9]

3. The judgment of this *amicus* is based on a full adversary trial, following which a federal court determined the applicable facts and the validity of EDS's commercial claim. Unless the facts found by the district court are clearly erroneous, they "may not be disturbed." *Campbell v. United States*, 373 U.S. 487, 493 (1963).

Finding facts and determining rights on the basis of an adversary presentation are also basic judicial func-

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[9] A provision in the Treasury regulations purports to prohibit the "entry of judgment." Even if valid, the regulation does not by its terms preclude the adjudication of facts and law on which a judgment is ultimately based. Significantly, moreover, this regulation has been construed to apply only to a judgment *which itself transfers an interest in property*, not a judgment adjudicating rights and liabilities; for the IEEPA confers authority only "with respect to property"—any other construction would violate the separation of powers. National Airmotive Corp. v. Government of Iran, 499 F. Supp. 401, 405 (D.D.C. 1980); Vishipco Line v. Chase Manhattan Bank, No. 77-1251 (S.D.N.Y. Nov. 3, 1979), slip op. at 5.

tions on which the Executive may not intrude. If the President could settle or suspend a case after the facts have been determined, he would implicitly have the power to alter a result—removing a case from the federal courts if the foreign state loses but not if it wins. In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court held unconstitutional a statute forbidding the use at trial of Presidential pardons as proof of loyalty to the Union. The law was held infirm because it intruded on the courts' fact-finding function; Congress may not forbid a court "to give the effect to evidence which, in its own judgment, such evidence should have." *Id.* at 147. And as recently as *United States v. Nixon*, *supra*, this Court held that claims of executive privilege must give way to the courts' fact-finding needs.

In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), this Court was faced with a statute that appeared to permit judicial review of administrative action while granting the President unreviewable discretion to revise the same action. The Court, in refusing to construe the statute as granting jurisdiction subject to Executive revision, held federal court judgments immune from Executive interference:

> [I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

Id. at 113.[10] Yet in this case the Executive asserts a

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[10] The decision invokes twin principles: the courts will not intrude on fact-finding by the President in his area of competence (333 U.S. at 111); adjudications by the courts may not be "sub-

power to review and revise by executive order every judgment, every judicial ruling, and every finding of fact rendered under the Foreign Sovereign Immunities Act. This position would render decisions under that Act advisory opinions at best and expensive and distracting nullities at worst.

4. The full sweep of the Government's position would have an immense effect on the constitutional balance of power, as the recent courts of appeals decisions readily acknowledge. The First Circuit made its reservations plain:

> We need not and do not hold that the executive possesses plenary power to settle claims, even as against foreign governmental entities. It may be that much of this area is within that 'zone of twilight in which [the President] and Congress may have concurrent authority.' *Youngstown*, *supra*, 343 U.S. at 637. The sheer magnitude of such a power, considered against the background of the diversity and complexity of modern international trade, cautions against any broader construction of authority than is necessary.

Chas. T. Main, *supra*, slip op. at 22.

The decision of the District of Columbia Circuit explicitly recognized the "separation-of-powers problems raised by an executive effort to affect the outcome of a pending case" and concluded that the Government's request to vacate the partial summary judgment entered there was an "intrusion on the judicial process . . . not

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ject to later review or alteration by administrative action"— otherwise they become impermissible "advisory opinions" (*id.* at 113-14).

Judge Porter is of the same view, finding that the Executive's assertions of power here would render "the orders and judgments of courts acting pursuant to express Congressional grants of jurisdiction mere advisory opinions." *Electronic Data Sys. Corp. Iran*, *supra*, (N.D. Tex. June 7, 1981), slip op. at 25.

warranted by the terms of the executive agreements, implementing executive orders, or the relevant regulations." *American International Group, supra*, slip op. at 35.[11]

It is thus surprising that the United States seeks here a quick endorsement of these unprecedented powers while asserting "that these questions are not particularly difficult" (Mem. Resps. at 10). For, whatever the Executive's asserted authority to interfere with the express jurisdiction of article III courts[12]—an assertion itself contrary to constitutional requirements—it surely does not encompass a negation of the entire gamut of the judicial process represented by EDS's judgment.

II. THE EXECUTIVE DOES NOT HAVE THE POWER TO NULLIFY OR NEGATE A PRE-FREEZE ATTACHMENT OF FUNDS HELD *IN CUSTODIA LEGIS*

The Executive's assertions raise a second issue, one unique to EDS: the power of the Executive to nullify or effectively negate a court-ordered pre-freeze attachment of funds, particularly where the funds are vested in the court. The issue centers on broad and varying positions

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[11] The opinions of the district courts are more blunt. Judge Duffy concluded that the suspension of claims would permit a President to "dictate the jurisdictional bounds" of United States courts, and thus violated the separation of powers. *Marschalk Co., supra*, slip op. at 56-57. Judge Porter said that, as applied to EDS's judgment, this assertion of power "would leave the judiciary subject to the unbridled whims of the Executive Branch . . . ." *Electronic Data Sys. Corp. Iran, supra*, (N.D. Tex. June 7, 1981), slip op. at 25.

[12] 28 U.S.C. §§ 1330 and 1605(a) (1976). The Second Circuit has recently issued a comprehensive opinion on this grant of jurisdiction, noting Congress' "true concern" that courts be mindful of its policy of providing "access to the courts" for claims against foreign states. Texas Trading & Milling Corp. v. Federal Repub. of Nigeria, No. 80-7703 (2d Cir. April 16, 1981).

taken by the Executive in its effort to legitimize a nullification of court-ordered attachments. The fluctuating positions it has taken on the EDS pre-freeze attachment illustrate the vice of the power asserted.

1. EDS5s final judgment was secured by a prejudgment Order of Attachment entered after a contested hearing in the United States District Court for the Southern District of New York on June 13, 1979. Pursuant to that Order, the District Court formally took custody [13] of some $20 million of funds of the Government of Iran, more than five months *before* the Executive's "freeze" of Iranian assets under the IEEPA. On the day following imposition of the freeze, the United States formally notified the Court of Appeals for the Second Circuit [14] that the freeze and the regulations promulgated thereunder had not affected the validity of the Order of Attachment entered by the District Court and that the regulations' prohibition against unlicensed attachments "is prospective only" and "does not nullify or void the preexisting attachment here." [15]

The Executive altered its stance following the Algerian Declarations. By Executive Order 12279, it directed the

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[13] These funds are held in a renewable certificate of deposit by and in the name of the United States Marshal in custody for the Southern District of New York.

[14] The attachment order was then on appeal to the Second Circuit. Electronic Data Sys. Corp. v. Social Security Organization of Iran, 610 F.2d 94 (2d Cir. 1979). The order of attachment is in full effect today.

[15] Indeed, the Federal and Iranian Respondents successfully opposed EDS's petition for certiorari before judgment on the ground that EDS was "unique" because it "was one of the very few claimants that instituted suit and obtained attachments *prior* to the November 14, 1979 blocking order." (Memorandum for the Federal Respondents in Opposition, No. 80-2035, June, 1981, at 8 n.8; *see* Iran Brief in Opposition, June 3, 1981, at 7, 13-14.) The United States pointed out that the "vast bulk of the over 400 Iranian cases involve suits filed, and attachments obtained, *after* November 14, 1979."

transfer of all Iranian related assets, including those covered by the EDS attachment. 46 Fed. Reg. 7919 (1981). The following month, President Reagan issued Executive Order 12294, 46 Fed. Reg. 14111 (1981), and implementing regulations, providing that any funds "subject to a valid attachment" *not* affected by the revocation of licenses of post-freeze attachments—a category virtually limited to the funds attached by EDS—"need not be transferred as otherwise required" by the Regulations. 31 C.F.R. § 535.213(c). The United States has said [16] that the EDS attachment will not be transferred by July 19, 1981.[17]

The new regulations, however, effectively negate EDS's attachment—without expressly nullifying it—by prohibiting all persons from "exercising any right, power or privilege, by court order, attachment, or otherwise," as to property in which Iran has certain described interests and which property, according to the Federal Respondents, includes EDS' attached funds. 31 C.F.R. § 535.218. Implied in this regulation is the asserted

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[16] In response to the June 4, 1981 Regulations directing transfer of all Iranian assets by June 19, 1981 (31 C.F.R. § 535.213(b)), the United States informed this Court that "the assets subject to the attachment petitioner [EDS] obtained in New York" "need not be transferred" by June 19, 1981. (Supplemental Memorandum for the Federal Respondents, No. 80-2035, June, 1981 at 5); and that a custodian who "chooses to transfer [EDS'] assets in contravention of the terms of an order of attachment would not be insulated from liability for that transfer." (*Id.* at 5 n.7.)

[17] Based on representations that the Executive orders and regulations "do not impinge upon the continued validity" of the Order of Attachment, the District Court for the Northern District of Texas has held that the attachment "obtained by [EDS] prior to the institution of freeze regulations is unaffected by those regulations, as well as Executive Order 12279." *Electronic Data Systems Corp. Iran, supra,* (N.D. Tex. June 7, 1981), slip op. at 17. The expansive ruling the Executive now seeks could affect this ruling as well.

power to prevent a judgment holder like EDS, with an attachment pre-dating the freeze, from satisfying its judgment. This is apparently a power as to which the Federal Respondents now seek a ruling from this Court removing "any remaining uncertainty about the validity of Executive orders *and regulations* implementing the Agreement with Iran" (Mem. Resps. at 9, emphasis added).

2. The Executive asserts a power that would permit it to negate *all* attachments involving Iranian assets—including a power to neutralize funds covered by the EDS attachment. Yet, those funds were placed in the custody of the district court long before the freeze, where they are held today *in custodia legis* to satisfy a final judgment issued by a federal court. In *Ex parte Tyler*, 149 U.S. 164 (1893), this Court held that property in the possession of a federal Circuit Court-appointed receiver was not amenable to seizure and levy under process issued from a state court to enforce state tax collection, without consent of the Circuit Court. The Supreme Court explained:

> The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded . . . . The maintenance of the system of checks and balances characteristic of republican institutions requires the coordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

149 U.S. at 182-83.[18]

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[18] *Accord*, Converse v. Highway Constr. Co. of Ohio, 107 F.2d 127, 130 (6th Cir. 1939) (The rule of non-interference with property in the possession of the court without first obtaining the court's con-

Nothing in the prior decisions of this Court, or in the lower court decisions upholding the Executive's nullification of *post*-freeze attachments, supports the power the Government urges here. The First Circuit specifically eschewed any decision affecting pre-freeze attachments—the "issue of presidential power to nullify judicially created interests . . . *retroactively*." *Chas. T. Main*, *supra*, slip op. at 10.

Similarly, this Court addressed post-freeze attachment orders in *Orvis v. Brownell*, 345 U.S. 183 (1953), where "the question [was] not whether a lien, concededly valid because obtained prior to the freezing order, may be 'annulled' by the [Executive] but rather whether the freezing order prevented the subsequent acquisition, by attachment, of such a property interest as the [Executive] would have to recognize . . . ." 345 U.S. at 188. Thus in *Orvis* the Court preserved the entire domain of pre-freeze attachments. The power asserted here would not only encompass a power to nullify retroactively a pre-freeze court order, but a court's custody of funds as well. If it is to be addressed in a ruling as the United States urges, such an unprecedented power cannot be sustained.

CONCLUSION

This Court has previously invoked the counsel of the Founding Fathers against adopting, in times of heated urgency, broad precedents which have far-reaching consequences. *United States v. Brown*, 381 U.S. 437, 444 (1965); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). In view

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sent is "of such importance to the interest and safety of the public and the administration of justice that it should be inflexibly maintained on all occasions."); In re Rubin, 242 F. Supp. 408, 412 (E.D. Pa. 1965).

of their constitutional infirmities, the assertions of Executive power raised in this case should not be upheld.

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Respectfully submitted,

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